IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1923 1925

No. 840. 300 41

SAMUEL FRESHMAN, Petitioner,

versus

W. S. ATKINS, Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit; Brief in Support Thereof; Appearance for Petitioner; Notice to Respondent.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

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TABLE OF CASES.

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PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Samuel Freshman, petitioner, represents:

On November 14, 1922, petitioner was adjudged a bankrupt by order of the District Court of the United States for the Northern District of Texas, at Dallas, he having but a few days theretofore filed a voluntary peti-

tion in bankruptcy. On February 18, 1923, he seasonably filed application for discharge (Tr. 3). Though he had many creditors, notice of objection and specifications of objections to such application (Tr. 3, 4) were filed by only one person, respondent.

Petitioner filed exceptions and demurrers to such objection and specifications of objection (Tr. 6) which were each overruled by the referee, acting as special master on the question of discharge (Tr. 12), to which petitioner excepted.

Thereupon a hearing was had before the special master on April 27, 1923, at which respondent was present in person but not represented by attorneys; at such hearing respondent stated in open court that he had no evidence to proffer (Tr. 13) and that he did not desire further time within which to procure witnesses or to employ attorneys, since he did not want to "send good money after bad" (Tr. 15).

The master then on his own motion interrogated petitioner, after which he dictated in open court, in the presence of petitioner and respondent, findings that each specification was wholly unsupported by evidence, evidence to the contrary being uncontradicted, and a recommendation that the discharge as prayed for be granted (Tr. 7). Respondent made no objection of any character to such action of the master (Tr. 23, 31), in effect abandoning his opposition.

Such findings and recommendations came on to be heard in the district court and petitioner appeared by attorneys; there was no appearance in opposition (Tr. 31). Thereupon the district court entered an order on June 9, 1923, granting the discharge in part and denying

the discharge in part, the denial being as to all creditors listed in the petition in bankruptcy filed by petitioner in the same court in November 1915 (Tr. 32). The denial of the discharge in part was based, as evidenced by the written opinion of the district court filed at the time of the entry of said order (Tr. 32), not upon any specification or objection of respondent or any creditor, but upon judicial knowledge of the pendency and status of the earlier bankruptcy proceeding (Tr. 36). The court on its own motion, on the basis of judicial notice only, determined that petitioner by **laches** in not obtaining a final determination of the earlier proceeding, in which the question had not been raised, had disentitled himself to a discharge, and that the question of discharge as to debts scheduled in the earlier, was therefore res adjudicata in the present case.

From this order of the court, petitioner seasonably filed a motion for rehearing (Tr. 38); on the hearing on such motion, evidence was introduced on behalf of petitioner (Tr. 68), detailing the history of the earlier bankruptcy proceeding and showing without contradiction that no final order had ever been entered therein denying petitioner a discharge and that petitioner had never caused any delay in such proceeding (Tr. 43-67). No other evidence was introduced (Tr. 68). There was no other appearance on the hearing than that on behalf of petitioner (Tr. 69).

The motion was overruled on June 18, 1923, and on the same day petitioner perfected his appeal to the United States Circuit Court of Appeals for the Fifth Circuit where the cause, docketed as number 4136 in said court, was heard on brief and oral argument for petitioner, there being no appearance for respondent (Tr. 84).

By judgment entered November 27, 1923 (Tr. 89), the action of the trial court was affirmed (Tr. 84); the opinion of the court filed with such order (Tr. 84) did not refer to the propriety of denying a discharge on the ground of laches, particularly laches in another case in which the question had never been raised, in a case in which no appropriate pleading and no proof had been offered in opposition to the application for discharge, but was based solely upon the proposition that the action of the trial court was justified under the provisions of section 14-b of the Bankruptcy Act, authorizing the judge to "**investigate the merits of the application.**" Since, however, the district judge did not investigate the merits of petitioner's application, but relied upon laches as a ground for denial of the discharge and a ground for not investigating the merits of the pending application in either of the proceedings, the circuit court of appeals, in effect, necessarily approved the reasoning of the district court. Petition for rehearing (Tr. 92) was overruled on December 24, 1923 (Tr. 105).

Petitioner files herewith a certified copy of the transcript of record in this case, including proceedings in the circuit court of appeals.

The judgment now entered in this case is final unless reviewed by this court on certiorari and is erroneous for the **following general reasons** relied upon by petitioner for allowance of writ of certiorari:

First. It was the duty of the district court, in the absence of appropriate pleading presenting, and in the absence of proof supporting, either objection or specification of objection, to grant final and complete discharge to petitioner. The opinions in the present case to the effect that it had no such duty, are in conflict with the

statements of this court in **Bluthenthal v. Jones,** 208 United States 64.

Second. The denial of the discharge in part by the district court being based solely on judicial notice of the status of an earlier bankruptcy proceeding, the pendency of an undetermined application for discharge in which was considered by the district court as equivalent to a determination adverse to the application for discharge therein, for the purpose of rendering the question res adjudicata as to all debts scheduled in the earlier proceeding, the denial of the discharge in part in this proceeding relating to such debts, was erroneous because:

a. The district court could not properly so deny the discharge in part on account of the absence of pleading and of proof in the record concerning the status of the earlier proceeding; judicial notice in the premises was unjustified.

b. The court having denied the discharge without any evidence in the record regarding the status of the earlier proceeding and in the absence of pleading, erred in not granting the discharge after the introduction of uncontradicted evidence on motion for rehearing showing that the earlier proceeding had never been determined but was undisposed of and pending and, hence, that there had been no final determination therein upon which could be based pleading or proof of res adjudicata.

c. The district court erred in determining by judicial notice in the present case that the application for discharge in the earlier proceeding should be denied on the ground of laches, laches not being one of the six offenses defined in Section 14-b of the Bankruptcy Act, on which grounds alone a discharge may be denied, and in deeming the earlier proceeding finally determined for that reason to

the extent that it rendered the petition for discharge res adjudicata in the present case; the opinion of the district court to such effect, is in conflict with a line of decisions including that of the Circuit Court of Appeals for the Second Circuit, **In Re Glasberg,** 197 Federal 896.

Third. The affirmance of the district court by the circuit court of appeals not having been based on the grounds on which the district court acted but on a construction of section 14-b of the Bankruptcy Act which would permit a district judge in passing upon an application for discharge to investigate on his own motion and without opposition to the discharge by any creditor, the merits of the application, and would permit him in so doing to go beyond the record in the case before him, was erroneous because:

a. The rule of law announced by the circuit court of appeals, permitting such an investigation by a judge on his own motion and out of the record of a case will lead to determinations of applications for discharge at the pleasure and within the discretion of district judges without the possibility of adequate review by appellate courts.

b. The opinion of the circuit court of appeals has disregarded and refused to follow the opinion of this court in **Bluthenthal v. Jones,** 208 United States 64, that of the Circuit Court of Appeals for the First Circuit, **In Re Marshall Paper Co.,** 102 Federal 872, and the long and uninterrupted line of decisions by all circuit courts of appeals to the effect that one opposing a discharge must show by clear and convincing evidence that the bankrupt has committed one of the six offenses defined in section 14-b of the Bankruptcy Act.

c. Were the conclusion of the circuit court of appeals correct in that a judge in passing upon an appli-

cation for discharge may deny the application on his own motion and on investigation of the merits of the application beyond the record of the case before him, nevertheless the affirmance of the present case was erroneous for the reason that, as shown by the opinion of the district judge herein, the denial of the discharge in part in this case was not based upon any investigation of the merits of the application but upon the erroneous proposition of law that the failure of petitioner to obtain a final determination of his application for discharge in the earlier proceeding amounting to laches therein, might be deemed equivalent to a final determination of the earlier proceeding to the extent that the question might be held res adjudicata.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this, on a date certain, to be therein designated, a full and complete transcript of the record of all proceedings in this case, to the end that the case may be reviewed and determined by this court as provided by law, that the said judgment of the circuit court of appeals may be reversed and that your petitioner may have such other and further relief and remedy in the premises as this court may deem appropriate and in conformity with law.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

The State of Texas,
County of Dallas.

I, Francis Marion Etheridge, being first duly sworn, on oath state that I am one of the attorneys for petitioner in the above case and that I have read the above and foregoing petition and know the contents thereof and allegations therein to be true.

FRANCIS MARION ETHERIDGE.

Sworn to and subscribed before me, this 23rd day of February, A. D. 1924.

PAUL CARRINGTON,
[Seal] Notary Public, Dallas County, Texas.

I hereby certify that I have examined the foregoing petition and in my opinion, the said petition is well founded in law.

FRANCIS MARION ETHERIDGE,
Attorney.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT ONE.

Petitioner was and is entitled to his discharge as prayed for unless the district court could properly deny such discharge insofar as relating to creditors listed in the earlier bankruptcy proceeding, based on judicial notice of the status of such earlier proceeding.

The record contained no objection or specification of objection to be considered by the district court. The district court so recognized by basing its action solely upon judicial notice of the earlier proceeding (Tr. 32). The circuit court of appeals so recognized as shown by its opinion to the effect that the district court was authorized on its own motion to investigate the merits of the application for discharge, it being expressly said in the opinion rendered by the circuit court of appeals (Tr. 85):

> "It is true that there was **no appropriate pleading** to present the issue and that **no proof** was formerly tendered on the hearing * * *."

More conclusively is this shown by the record of proceedings before the referee. The only notice of objection filed with the referee who acted as special master on the question of discharge, was a letter to him by respondent "representing the estate of George T. Atkins, deceased" (Tr. 3). Respondent thereafter as "objecting creditor" filed the only specifications of objection to the discharge of petitioner (Tr. 4). Petitioner excepted and demurred to such objection and specifications of objection as a whole (Tr. 6) for the reason that there was no showing that respondent was entitled as a creditor to file the same.

The record shows that George T. Atkins had been a creditor of appellant and that appellee became interested in the estate of George T. Atkins by virtue of the provisions of a will (Tr. 24). Despite this indefinite and uncertain showing that respondent was entitled to raise an issue, the master overruled the exception of petitioner, the same being preserved in the record (Tr. 25, 71).

Only four specifications of objection were filed by respondent. When these came on for hearing before the master, respondent appeared in person but without attorney. Thereupon respondent was asked by the master what evidence, if any, he desired to proffer in support of his specifications (Tr. 12). After the proffer of a single instrument which was clearly inadmissible and which the master refused to permit to be introduced in evidence, to which action respondent did not object (Tr. 13), respondent stated that he had no evidence to proffer and that he did not desire further time within which to procure witnesses or to employ attorneys saying that he did not want to "send good money after bad".

Thereupon the master on his own motion interrogated petitioner and at the conclusion of the hearing dictated, in the presence of respondent, his findings that none of the specifications were supported by any evidence, but that by uncontradicted evidence each was shown to be unfounded. Respondent made no objection of any character to such findings of the master (Tr. 23).

Upon the presentation of the findings and recommendations of the master to the district court, petitioner was represented by attorneys, but there was no appearance in opposition either on the original hearing on June 9th, 1923, when the district court entered the order denying the discharge in part, or on the subsequent hearing on

June 18th, 1923, when petitioner's motion for rehearing was overruled (Tr. 31, 69).

Though respondent was served with citation on appeal to the circuit court of appeals, no appearance on his behalf was therein entered either on original action by the court (Tr. 84) or on petition for rehearing (Tr. 105).

Unquestionably, there was no objection or specification of objection and no evidence on which the district court could act in denying a discharge in whole or in part; it could act only on judicial notice.

POINT TWO.

The district court could not properly deny the discharge in part because of the status of the earlier bankruptcy proceeding, for there was neither pleading nor proof in the record concerning the existence or status thereof; judicial notice in the premises was unjustified.

There was nothing in the objection or specifications of objection presented to the referee, in any way referring to any previous bankruptcy proceeding either as a basis for the denial of the discharge or otherwise (Tr. 3, 4). There was no pleading of the existence or status of such earlier proceeding.

On examination of petitioner by the master on his own motion, there was but a single question relating to the earlier proceeding (Tr. 21):

> "Q. You have referred to the earlier bankruptcy proceeding. (The reference was to loss of books by the trustee in the former proceeding and to the unsuccessful attempt of trustee therein to recover property from petitioner's minor son). Did you file an application for discharge there? If so, what is the status of that application now?"

The answer to this question (Tr. 21, 22) was that the previous application for discharge had not been finally acted upon but was yet pending.

This answer was not sufficient for a denial of the discharge in part by the district court and in fact was not the predicate for such action by the district court as indicated by its written opinion (Tr. 33):.

> "This court judicially knows, even though it has no actual knowledge, that this same bankrupt has an application pending in this court for a discharge, from practically the same debts and creditors that are scheduled in the present proceeding, and that, however, such discharge was recommended against by the referee, he has not pressed a hearing on such application but has allowed the years to run by and is now seeking through another proceeding the same thing that he was compelled to seek in the first proceeding, if he should have relief."

The district court on the basis of judicial notice of the status of such earlier proceeding, denied the discharge recommended by the master insofar as relating to the creditors listed in the earlier proceeding, having concluded that the question whether petitioner should have his discharge as to such creditors was **res adjudicata.**

This action of the district court was erroneous for the reason that there was no pleading referring in any way to such earlier proceeding. It is uniformly and conclusively held that a defense of res adjudicata must be affirmatively pleaded just as a defense of payment must be so pleaded. As a general proposition of law, this proposition so far as we have been able to ascertain has never before been questioned. As illustrative of many cases to such effect, we cite but a single case: **Harrison v.**

Remington Paper Company, Circuit Court of Appeals for the Eighth Circuit, 140 Federal 385.

This general proposition of law is logically applicable to the issue of discharge in bankruptcy. Whatever may or may not constitute a final decision of a question of discharge and may or may not, therefore, be relied upon as a basis for a plea of res adjudicata, and it is this question only which is referred to in the opinion of the district court, in no other bankruptcy case than this insofar as we have been able to learn has a discharge been denied on the ground of res adjudicata unless such a plea has been asserted affirmatively as a ground for denial of the discharge.

This court, in **Bluthenthal v. Jones,** 208 United States 64, unanimously held that a discharge granted in the absence of an affirmative pleading of res adjudicata, is valid and binding upon all parties, since a discharge may not be refused on the ground of a refusal in a previous bankruptcy case unless there is pleading and proof of res adjudicata. We quote from the opinion of Mr. Justice Moody rendered in 1908 (page 66):

> "Undoubtedly as in all other judicial proceedings, an adjudication refusing the discharge in bankruptcy finally determines for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal is based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, **it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced.** Plaintiffs in error failed to do this. When an application was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court **was, by the terms of**

the statute, bound to grant it unless upon investigation it appeared that the bankrupt had committed one of the six offenses as specified in section 14 of the Bankruptcy Act as amended. **An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by the showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place.** Bluthenthal and Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge."

The district court also erred in denying the discharge because of the status of the earlier proceeding, because there was no evidence in the record before it on which such a denial would have been justified even had there been a plea of res adjudicata. The only reference in the record (Tr. 21) was clearly inadmissible and the record was completely devoid of evidence which the court could properly consider. Consideration of the only reference in the record could not be the basis for an adverse action by the district court, for such evidence, if admissible, was incomplete and insufficient. Only by judicial notice as indicated by the written opinion of the district court (Tr. 33), could such an affirmative plea of res adjudicata, even if it had been filed, have been sustained. As a general

rule, it is well recognized that such judicial notice is improper. The reason for this is well stated in 15 Ruling Case Law, at page 1111:

> " * * * **the decision of a cause must depend upon the evidence introduced. If the court should recognize judicially facts adjudicated in another case it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party, while if they had been properly introduced they might have been met and overcome by him. So on a plea of res adjudicata a court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be pleaded and proved.**"

In support of this proposition citation is there made of a long list of cases including notes in various annotated reports. We consider the proposition conclusively determined and that it is necessary to refer to a few only of the many cases to such effect, cases in which judicial notice of proceedings in the same court is held improper, illustrating the application of the general rule irrespective of the question whether the former proceedings were had in the same or in another court:

Murphy v. Citizen's Bank, Arkansas, 100 Southwestern 894;

Pacific Iron & Steel Works v. Goerig, Washington, 104 Pacific, 151;

Pickens v. Coal River Co., West Virginia, 65 Southeastern 865;

Pye v. Wyatt, Texas Civil Appeals, 151 Southwestern 1086;

Matthews v. Matthews, Maryland, 77 Atlantic 249;

Ollschlager's Estate, Oregon, 89 Pacific 1049;
McCormick v. Herndon, Wisconsin, 31 Northwestern 303.

There being neither pleading nor proof of the status of the earlier proceeding in bankruptcy or even of the institution or pendency of the same in the record as presented to the district court and there being no issue raised in such record that a discharge should be denied on the ground of res adjudicata or on any other ground since the four specifications of objection had been abandoned, it was the duty of the district court to grant the discharged as prayed for.

POINT THREE.

If it had been proper for the district court to consider the status of the earlier bankruptcy proceeding in determining whether to grant the discharge as prayed for, the denial of such discharge in part was improper, for it is shown without contradiction in the record that the status of such proceeding constituted no ground for denial of the discharge in whole or in part.

At the time of the presentation of the record to the district court as stated in its written opinion, the earlier bankruptcy proceeding had not been determined but was still pending on a recommendation or purported recommendation and exceptions thereto (Tr. 33).

After the dictation of the written opinion by the district court herein, but before the entry of the order thereon, the district court considered the record in the earlier proceeding on its own motion and without notice to any one and on the same day entered an order deying the discharge (Tr. 32, 37, 47, 67).

Petitioner seasonably filed his motion for rehearing (Tr. 38) and attached to such motion affidavits showing the status of the earlier proceeding (Tr. 43-67). A hearing on such motion was had at which evidence was introduced according to the purport of such affidavits (Tr. 68) to the following effect:

The earlier proceeding was filed in November, 1915, and application for discharge therein was filed May 12th, 1916 (Tr. 43). Notice of opposition to this application was filed on August 25th, 1916, by Irish & Thornton, as attorneys for Citizens State Bank & Trust Company and George T. Atkins, and a specification thereon was filed on August 26th, 1916 (Tr. 44, 64). This, the only specification of objection to the application for the discharge, was referred to Honorable Eugene Marshall, the referee, as master (Tr. 64). Hearings were had before such master commencing February 1st, 1917, testimony of the bankrupt and the trustee in bankruptcy being introduced but not the books of the bankrupt which were then in custody of the trustee (Tr. 44). For a year after such hearings the master failed to perfect his record indicating in conversations with attorneys for the bankrupt that he was undecided (Tr. 44). On or about February 1st, 1917, the master had dictated a memorandum in which he expressed a conclusion that the discharge should be denied; the memorandum, however, had not been signed and in later conversations with attorneys for the bankrupt, the master promised that when he should become ready to make up his report, he would permit all parties to be heard as to the form of his findings and recommendations and give all a chance to file formal exceptions (Tr. 44). In 1918 the master died without having called the attorneys before him as he had agreed

to do and, insofar as known, without having taken any further action or cognizance of the case (Tr. 44). A new referee being appointed, he told attorneys for the bankrupt repeatedly in answering their inquiries, that the record of proceedings before the deceased master could not be found (Tr. 45). On January 28th, 1921, without notice having been given of the finding of such record or that any decision had been or would be made by the new referee (Tr. 45), such new referee filed in the district court his recommendation that the discharge be denied, as follows (Tr. 65):

> "I have the honor of submitting herewith a memorandum by the late Eugene Marshall, deceased, referee in bankruptcy, made in the matter on the 1st day of February, 1917. The lamented referee, although he did not sign said report, indicates that he recommended the said bankrupt should not be discharged, and after reading the testimony taken in this matter and submitted herewith, I am of the opinion that under section 14 of the Bankruptcy Act, clauses 2 and 3, the said bankrupt is not entitled to a discharge and recommend that the application for discharge be denied."

Long before the date of this instrument the firm of Irish & Thornton, the attorneys who had been opposing the discharge, had been dissolved and Mr. Thornton who had been looking after the matter for the objecting creditors, had been elected and had served a term as judge of a county court in Dallas County, Texas. Long prior to the date of such instrument the Citizens State Bank & Trust Company, one of the objecting creditors, had dissolved, and George T. Atkins, the other, had died (Tr. 46). No action of any character by either of the objecting creditors or by the attorneys for them was taken

in the proceedings after February 1st, 1917, the recommendation by the referee being without notice and on his own motion (Tr. 46). So soon as attorneys for the bankrupt learned of the filing of this recommendation, they filed exceptions thereto in the office of the district clerk (Tr. 51-63) in which a history of the cause was presented and in which it was asserted that the recommendation was improper in that the matter had never been referred to the new referee as a master, in that the purported recommendation of the deceased referee was never signed by him or decided upon by him, and in that the new referee had never seen the witnesses but had acted solely upon the unsigned memorandum of the old referee and the unsigned transcript of testimony of the witnesses. Such recommendation or purported recommendation and such exceptions were never acted upon, consideration of the same by Judge Meek having been postponed on one occasion because of serious illness of his son and further delays being occasioned by the greatly congested condition of the court docket (Tr. 65, 66). None of the parties interested had ever asked to have the same set down for hearing and the same was not heard or considered by the court before June 9th, 1923, when the court without notice to any of the parties took the same under consideration and entered the following order (Tr. 66, 67, 47):

> "The recommendation of the referee heretofore made on the 28th day of January, A. D. 1921, that the court deny a discharge to the bankrupt be, and the same is, hereby followed and such discharge is denied."

On June 15th, 1923, attorneys for the bankrupt in the earlier proceeding filed a motion to re-open and rehear

the question of discharge, incorporating in such motion the exceptions which they had theretofore filed in such cause and further asking for a dismissal of the specification of objection as abandoned (Tr. 47-63). Such motion at the time of the hearing in this cause on June 18th, 1923, was still pending and undisposed of (Tr. 47).

The foregoing, being the evidence introduced on June 18th, 1923, in support of the motion for rehearing, was uncontradicted and showed, first, that there had never been a final determination of the application for discharge or of the objection or specification of objection thereto in the earlier proceeding, the motion in such earlier proceeding of June 15th, 1923, being still pending and undisposed of; and second, that there was no proper basis for a final determination in such earlier proceeding that the discharge which had therein been applied for should be denied, because the deceased master, who only had heard and seen the witnesses testify had never made a recommendation, and because the objecting creditors and their attorneys had disappeared from the scene, their objection to the discharge having been abandoned.

With the status of the earlier proceeding thus established on rehearing, we submit that the denial in part of the discharge as prayed for, was improper. The earlier proceeding not having been determined but being undisposed of and pending, there was no final determination therein upon which could be based pleading or proof of res adjudicata. It is uniformly and conclusively determined that a plea of res adjudicata may be established only by a showing of a final determination of the identical question in a previous cause between the same parties or those in privity with them. Thus a plea of res adjudicata cannot lie where the earlier proceeding is pending and un-

disposed of either in the trial court or on appeal. A motion for new trial or to arrest a judgment will prevent that judgment being a final determination so long as such motion is pending and undisposed of, such that it may be set up to establish a plea of res adjudicata:

Blue Goose Mining Co. v. Northern Light Mining Co., Circuit Court of Appeals for the Ninth Circuit, 245 Federal 727;

Texas Trunk Railway Co. v. Jackson Brothers, Texas Supreme Court, 85 Texas 605;

Collins v. Metropolitan Life Insurance Company, Illinois, 83 Northeastern 542;

Rudolph v. German Mutual Fire Insurance Company, 71 Illinois 190;

Fulliam v. Drake, Iowa, 75 Northwestern 479.

Clearly, the motion pending and undisposed of in the earlier proceeding would preclude a showing of res adjudicata by pleading or proof. Certainly, res adjudicata may not be established by judicial notice of such status of the earlier proceeding.

The district court in its opinion recognized this general rule but asserted that there is an exception recognized in bankruptcy law. In support of this proposition, citation is made in the written opinion (Tr. 34, 35, 36) to several cases in which it is held that where a bankrupt fails to apply for a discharge within the twelve-month period prescribed by the Bankruptcy Act, his failure so to apply is equivalent to a determination that he is not entitled to a discharge, that in a subsequent bankruptcy proceeding such a failure to apply for a discharge may be pleaded as res adjudicata and shown in proof of such a plea, and that a plea so proved conclusively determines the contention of those opposing the discharge in the sec-

ond proceeding and entitles them to an order denying the discharge as to them. It is to be noted that every case cited by the district court was such a case and that in each there was opposition to the discharge in the second bankruptcy proceeding and that such opposition pleaded and proved the failure to apply for a discharge in the earlier proceeding. In no case relied upon by the district court is there an illustration of judicial notice.

Such authorities are, however, readily distinguishable from the present case. They follow logically from the provisions of the Bankruptcy Act, section 14-a, which permits the filing of an application for discharge only within a stipulated period after the adjudication of bankruptcy. Where, however, an application is filed within such stipulated period, its pendency thereafter may not be held, under the authorities cited, to be equivalent to an adverse determination.

The position of the district court was that the authorities discussed had some analogy to the case before it, it having concluded from judicial notice that petitioner had failed to prosecute with reasonable diligence his application for a discharge in the earlier proceeding though he filed his application within the twelve-month period and that because of laches the earlier proceeding might be deemed disposed of adversely to him.

It is to be noted that according to the uncontradicted evidence introduced on rehearing, the earlier proceeding came on for hearing before the master on the specification of objection in February, 1917, and that no unusual delay or laches on the part of anyone is or may be claimed up to that point. From the time of such hearing attorneys for the bankrupt, according to the uncontradicted evidence, diligently sought a determination of the question

by the master until his death, and their efforts thereafter were also unavailing because of the apparent loss of the record. So soon as attorneys for the bankrupt were advised of the action of the new referee, they filed their objections thereto in the district court. **From the time that the specification of objection was filed in 1916, the burden of proof rested upon the objecting creditors;** they were the proponents of the only issue to be determined by the court upon recommendation of the master and unless the issue raised by them should be determined as they contended after clear and convincing testimony to such effect, the bankrupt was entitled to his discharge of right. **The delay of several years was on the final determination of the issue raised on the specification of objection and the bankrupt at no time during the period of delay was the proponent of this issue.** Notwithstanding which fact diligence by attorneys for the bankrupt is shown by their uncontradicted testimony on rehearing. We submit that there can be no laches prejudicial to the rights of the bankrupt in such earlier proceeding or in these proceedings even if the efforts of his attorneys to have a final determination be ignored, for the reason that **the bankrupt was under no duty to proceed, not being the proponent of the issue.**

We further submit that if there has been an abandonment on the part of any one in such earlier proceedings, or any laches, it has been that of the opposing creditors, the proponents on the only issue, who have done nothing since February, 1917, and who, with their attorneys, have disappeared from the scene entirely long since. Were a motion to be presented in such earlier proceedings setting up such facts, of course we concede the court should not do it on its own motion, should the court not dismiss

the objection and specification as having been thus abandoned, especially in the absence of a proper record of proceedings before the deceased master?

Even were there laches on the part of the bankrupt, however, a discharge in the earlier proceeding could not be properly denied on such account for the Bankruptcy Act specifies six grounds for the denial of discharge, laches not being one of the six, and a discharge may be denied only upon one of such six grounds. Authorities to this effect are conclusive.

In Re Wolff, District Court for the Northern District of California, 132 Federal 396, an objecting creditor filed a motion to dismiss the bankrupt's application for discharge because the bankrupt had failed and neglected to prosecute the application. In his opinion on denial of such motion, Judge DeHaven said (page 397):

> "The facts stated in the affidavit are not such as to warrant the court in dismissing the bankrupt's petition for discharge. In Re Sutherland, Deady, 573, Fed. Cas. No. 13,640, is in point. In that case it is said:
>
> " 'When an appearance has been entered by any creditor against the discharge, the proceedings upon the petition are no longer under the exclusive control of the bankrupt; but the opposing creditor cannot then move to dismiss the petition, or that its prayer be denied, because the bankrupt is, or supposed to be, dilatory in bringing the matter on for hearing. The remedy of the creditor is to move the court to set down the matter for hearing upon the petition and his objection thereto, if any be filed.'
>
> "In addition to this, it may be said that the dismissal of the petition for discharge is, in legal effect, a denial of the same. Section 14 of the bankruptcy act (July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) specifies the causes for which a dis-

charge may be refused. **Laches of the bankrupt in not bringing on a trial of the issues raised by a creditor's opposition to his application for discharge is not one of the enumerated causes, and the court is not authorized to extend the provisions of that section, and refuse a discharge upon any other grounds than those therein set forth.** Brandenburg on Bankruptcy (3d Ed.) S. 377.

"Motion denied."

To the same effect is the case of **In Re Glasberg,** 197 Federal 896, decided by the Circuit Court of Appeals for the Second Circuit in 1912. There a motion of an objecting creditor to dismiss the application of the bankrupt for discharge on the ground of laches had been granted. The Circuit Court of Appeals reversed this order saying (page 897):

> **"Delay in bringing on the hearing is not a ground for refusing a discharge found in the act. It specifically enumerates what the grounds are and this is not one of them."**

In Re Neal, 270 Federal 289, opinion by District Judge Sibley, is a case in which the referee had made his recommendation in November, 1917, and in which the objection was made on final hearing before the court in September, 1919, that the discharge should be denied because of laches of the bankrupt. The court said (page 290):

> "Bankruptcy Act, section 14-a, provides for the filing of the application for discharge within a limited time and
>
> (b) 'The judge shall hear the application for discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest at such time as will give the trus-

tee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless'—he has done one or more of six classes of acts minutely specified.

"**It will be observed that the language of section 14-b is directed wholly to the judge and not to the bankrupt and is mandatory in its terms.** While undoubtedly the applicant for discharge is under the usual duties of diligence imposed on suitors, they are not to be derived from or measured by the quoted section. The judge is commanded to do three things: (1) Hear the application for discharge and the proofs and pleas in opposition to it; (2) investigate the merits of the application; and (3) discharge the applicant unless he has done the things named in the statute.

"**To dismiss this application unheard, would be simply to fly in the face of this mandate.** The fact that from some unknown cause the hearing was not had seasonably will not warrant the judge in refusing to hear at all, in declining to investigate the merits of the application, or to discharge the applicant. It would be to amend the statute and add another specification to the grounds for refusing a discharge, to penalize a want of diligence in pressing for a hearing as heavily as the commission of the crimes and frauds mentioned in the section. **A bankruptcy case is one in equity. The extreme penalty for negligence in failing to press for a trial, as fixed by Equity Rule Number 57, is dismissal without prejudice;** but a dismissal of this application would be to bar a discharge entirely, for a new application could not now be filed in this case, nor could these debts be discharged even by another bankruptcy, In Re Silverman, 157 Fed. 675, and cases cited."

The district court could not, therefore, because of delay in the earlier proceeding, deny petitioner his discharge therein; more clearly is it true then that in the present case the district court could not properly treat the earlier case as a basis for res adjudicata, before even the attempt was made so to deny the discharge in the earlier proceeding on such ground.

It is to be noted that in each of the cases cited the question was raised not on motion of the court or by invocation of judicial notice, but on the insistence of an opposing creditor. In no other reported case that we have been able to discover has the question of laches been raised by a court on its own motion or passed upon by a court when raised by an opposing creditor on the basis of judicial notice. **The more clearly is the action of the district court unprecedented and erroneous when it is considered that the question of laches was raised on its own motion and determined on the basis of judicial notice only, not in the case in which the asserted laches occurred, but in a second case in which the court on its own motion and acting solely on the basis of judicial notice decided that the first case might be deemed finally determined to the extent that it might serve to render an issue, not raised in the second case but considered by the court on its own motion, res adjudicata.**

POINT FOUR.

The denial of the discharge herein cannot be justified by a construction of the statute permitting the district court to "investigate the merits of the application."

In the absence of appropriate objection and specification of objection to the discharge and of proof in support

thereof, the bankrupt is entitled of right to his discharge. The Bankruptcy Act, section 14-b, provides:

> "The **judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto** by the trustee or other parties in interest at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application **and discharge the applicant unless** * * * (he has committed one of six defined offenses)."

From a reading of this statute alone it seems clearly intended that the judge shall consider in passing upon the question of discharge the application for a discharge, the pleading in opposition thereto and such evidence as the parties with reasonable opportunity so to do shall submit, and that unless it is clearly shown by such evidence that one of the six defined offenses has been committed, a discharge should be granted. This has been the uniform construction of the statute with the exception of the opinions rendered in the present case.

This court in **Bluthenthal v. Jones**, as quoted on pages 13-14 above, has specifically held that it is the duty of a creditor, if he would prevent the granting of a discharge, to file objections and to prove:

> "either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses," (208 U. S. 66).

failing which the judge "**was, by the terms of the statute, bound to grant**" the application for a discharge. In the same paragraph, above quoted, this court has stated, as we understand, that the investigation of the merits of

the application for discharge which the judge may make shall be limited to an investigation and consideration of the pleading and evidence in the case before him.

The circuit court of appeals which has decided the present case has heretofore so construed the opinion in Bluthenthal v. Jones. That court said, **In Re Bacon,** 193 Federal 34, after quoting the paragraph referred to from the opinion of this court (page 37):

> "From this it appears to be required that the granting of the discharge under a second petition be resisted by objecting creditors with claims provable under a first petition."

The Circuit Court of Appeals for the First Circuit carefully considered the purpose and effect of the clause in the statute directing the judge "to investigate the merits of the application:" **In Re Marshall Paper Co.,** 102 Federal 872. Judge Lowell sitting in the District Court of Massachusetts, held that there was no merit in the application for discharge, basing his refusal on a ground not specified by creditors: **In Re Marshall Paper Co.,** 95 Federal 419. The district judge relied on the clause in question (page 422):

> "It should be observed, however, that under the existing bankruptcy act the duties of the judge regarding discharge are more onerous than those imposed by the Act of 1867. He is directed to **'investigate the merits of the application,'** and hence is not confined to the consideration of those objections to the discharge which are properly set forth by creditors."

The circuit court of appeals unanimously reversed Judge Lowell. After quoting section 14-b of the Bank-

ruptcy Act and stating that the bankrupt is entitled to a discharge as a matter of right, provided he has not committed one of the offenses enumerated, the court said (102 Federal 874):

> "By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. In re Black (D. C.), 97 Fed. 493. A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, **'investigate the merits of the application,'** must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.
>
> "When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, **it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant.**"

This decision has been cited with approval in many subsequent cases though in none of them does the question now under discussion appear to have been raised. We submit that the decision is clearly correct; it is con-

sistent, whereas the opinion of the circuit court of appeals herein is inconsistent, we think, with the long line of decisions by all circuit courts of appeals to the effect that a discharge must be granted unless the commission of one of the six offenses "be shown by clear and convincing evidence." Cases to such effect by the circuit court of appeals which decided this case, are:

Humphries v. Nalley, 269 Federal 607;
Garry v. Jefferson Bank, 186 Federal 461;
Hardie v. Swafford Bros. Dry Goods Co., 165 Federal 588.

At least one decision to the same or a similar effect has been rendered by each of the other circuit courts of appeals.

The imposition of such a burden of proof upon the one opposing a discharge is meaningless if the judge on his own initiative may investigate the merits and deny the discharge solely upon such investigation. No reason is perceived why, if such an investigation be permitted, it would be limited to an investigation by the judge of the records of his own court or to matters of which it has been heretofore decided that a court may, under proper pleading and proof, take judicial notice. Even if the investigation be limited as suggested, many of the evils of star chamber proceedings would necessarily be attendant, and the granting or denying of a discharge might be made in some cases a matter entirely discretionary with the judge and **practically impossible of review.**

For example, if in a previous suit by Atkins against Freshman in the judge's court, the uncontradicted evidence supporting a default judgment in favor of Atkins on his debt, had shown that Freshman had obtained money from Atkins upon a materially false statement in

writing made by Freshman for the purpose of obtaining credit from Atkins, would the judge in a later bankruptcy proceeding filed by Freshman, in which no objection had been made to his discharge, be justified in taking cognizance of the record of evidence in the preceding case and in denying the discharge on his own initiative on such account? Our courts have uniformly held pursuant to the deep-rooted Anglo-Saxon conception of litigation, that the decision of a cause must depend upon the issues raised by the parties and upon the evidence introduced. Inquisitorial methods of procedure known in the civil law have never been adopted by our courts. In the hypothetical case, the uncontradicted evidence in the earlier case, even should it have been explicitly adjudicated to have been true and correct, could not be properly considered by the judge in the later case, certainly unless properly introduced in evidence on proper issues raised by pleadings. **Res adjudicata must be pleaded and proved.**

The present case is, we think, more clearly unjustifiable than the hypothetical one. The district judge when considering the recommendations of the referee herein, took judicial notice not of any previous adjudication nor of any record of testimony in the previous case, but merely of the length of pendency of such earlier case. Based solely on the proposition that the length of pendency of the earlier case conclusively showed laches, the discharge herein was denied. On which one of the six grounds enumerated in the statute can such a denial be based?

The denial of the discharge herein can be justified under the opinion of the circuit court of appeals only if it be shown that the district judge on investigation found that petitioner had committed one of the six offenses defined in section 14-b. The written opinion of the district

judge negatives that; his opinion does not indicate that he has found that petitioner has committed one of the six offenses. The discharge was denied by the district court solely because of laches and that is not a proper ground for denial of a discharge.

A more clear example of the injustice of a procedure which would permit the district judge to take cognizance of grounds for denying a discharge and to deny a discharge on such grounds in the absence of opposition, could not be presented; **even if laches were a valid ground for denying a discharge, delay could not be held conclusive; explanation for it should be permitted and an opportunity for such explanation is not afforded when in the absence of pleading and proof relating to the question, the judge may, at his discretion, determine the question based upon an investigation made upon his own initiative.**

There is involved in the present proceeding no abuse of the process of the courts. There is in substance the same sort of controversy involved, though other creditors are also here involved, as there would be if Atkins were prosecuting a suit against Freshman on his debt. The question in this and in the hypothetical case is whether the debt of Freshman to Atkins is and shall remain a subsisting obligation. The court is not a guardian or trustee for either of the parties in either case. Atkins, let us assume, filed suit and upon a trial after due hearing it was finally determined that he should take nothing. If thereafter Atkins should bring a second suit on the same indebtedness, it would be the duty of the court clearly, if Freshman did not plead res adjudicata and was in default, to render judgment for Atkins on the same claim which had been previously determined to be unfounded. In the hypothetical case the duty was upon

Freshman to plead his defense of res adjudicata or otherwise to avoid default in the second suit. If by assuming the hazard of court costs and expenses in the second suit, Atkins should thus obtain a judgment by default, the judgment would nevertheless be valid. Courts have uniformly so decided. **Res adjudicata must be pleaded and proved.** With even greater reason the courts have also decided uniformly that the defense of a suit pending must be pleaded and proved or else is waived.

The opinion of the district court herein shows that the discharge was denied in part, not because the judge after investigation concluded that the bankrupt had committed one of the six defined offenses, but because he had concluded that the bankrupt had been guilty of laches in not obtaining a determination of the first proceeding. The judge had control of the cases on his docket and in permitting the later case to be submitted to him for determination first, in overruling the motion for rehearing in the later case while the motion in the first was still pending, and in permitting such motion to remain pending while appeal in the later case was taken, has shown that the issue in neither case now involves the question whether in fact petitioner committed one of the six offenses. There remains no proponent insisting that petitioner did so in either case. The only issue in either case is one of law, as the district court has treated the two cases; the issue in the first, whether laches has precluded the bankrupt from discharge; the issue in the second, whether laches in the first case can in any way affect the right of the bankrupt to a discharge in the absence of opposition.

The affirmance of this case by the circuit court of appeals necessarily involved therefore an approval of the conclusion that laches in the first proceeding precluded a discharge as to the debts in question, in both proceedings. That issue if finally so decided in the present case, will determine the case pending in the district court notwithstanding the assumption of the circuit court of appeals to the contrary. That issue will determine the earlier case, not on the specification of objection once made and long since abandoned by the deceased opposition, but on an issue of law squarely raised in the present record, whether laches found by a court on its own motion, without pleading or proof, is a ground for denial of a discharge.

We, therefore, ask that the writ of certiorari applied for be granted and that the errors of the district court and the circuit court of appeals herein be corrected.

Respectfully submitted,

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

Dallas, Texas, February 21, 1924.

APPEARANCE FOR PETITIONER.

To the Clerk of the Supreme Court:

You will kindly file this instrument as our appearance as attorneys and counsellors for petitioner in Samuel Freshman, petitioner, v. W. S. Atkins, respondent.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK.

NOTICE TO RESPONDENT AND PROOF OF SERVICE.

The respondent, W. S. Atkins, is hereby notified that the petitioner, Samuel Freshman, will, on Monday, the 10th day of March, 1924, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States, in the city of Washington, D. C., his certified petition for a writ of certiorari from that court to the United States Circuit Court of Appeals for the Fifth Circuit in cause No. 4136 on the docket of the said court, styled Samuel Freshman, appellant v. W. S. Atkins, appellee, and you are herewith delivered a copy of said petition for a writ of certiorari, and brief in support thereof.

FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
Attorneys for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy of said petition for a writ of certiorari and brief is hereby acknowledged on this, the 23rd day of February, 1924, at Dallas, Dallas County, Texas.

W. S. ATKINS,
Respondent, in person.